UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THRIVEST SPECIALTY FUNDING, LLC, Petitioner, v. WILLIAM E. WHITE, Respondent.	Civil Action No. 2:18-cv-

COMPLAINT TO COMPEL ARBITRATION

Pursuant to 9 U.S.C. § 4, petitioner Thrivest Specialty Funding, LLC ("Thrivest") hereby petitions this Honorable Court for an order directing respondent William E. White ("White") to arbitrate their dispute under the Non-Recourse Finance Transaction, Sale and Purchase Agreement (the "Agreement") through which Thrivest purchased a portion of White's expected recovery (the "TSF Distribution") in the NFL Concussion Litigation for $500,000.

INTRODUCTION

1. On April 11, 2018, Thrivest commenced an arbitration against White for breach of the Agreement, declaratory judgment and emergency interim relief because White refused to honor his contractual promises. A true and correct copy of Thrivest's Demand for Arbitration and Application for Emergency Interim Relief (the "Demand") in Thrivest Specialty Funding, LLC v. White, AAA No. 01-18-0001-4765 (the "Arbitration") is attached as "Exhibit 1."

2. White asserts that the entire Agreement is invalid under Section 30.1 of the Settlement Agreement in the NFL Concussion Litigation (the "No Assignment of Claims

Provision"), and so White has refused not only to transfer the TSF Distribution[1] as promised, but also to recognize AAA's jurisdiction over the dispute.

3. White does not dispute the making of the Agreement or specifically challenge the arbitration clause and so, in accordance with United States Supreme Court precedent and the plain language of the parties' agreement to arbitrate, the Court should enter an order compelling arbitration. See Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 72 (2010) ("even … where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of the contract—we nonetheless require the basis of challenge be directed specifically to the agreement to arbitrate before the Court will intervene").

PARTIES

4. Petitioner Thrivest is a Delaware limited liability company with its principal place of business at Eight Tower Bridge, 161 Washington Street, Suite 240, Conshohocken, Pennsylvania 19428; Thrivest's members are citizens of the Commonwealth of Pennsylvania.

5. Respondent White is an adult individual, a member of the class of former NFL players in the NFL Concussion Litigation, and a citizen of the State of Ohio whose address is 3912 Tramore Drive, Dublin, Ohio 43065.

JURISDICTION AND VENUE

6. The Court has subject matter jurisdiction under 28 U.S.C. § 1332 because complete diversity of citizenship exists between Thrivest and White, and the amount in controversy exceeds $75,000.

[1] As of April 30, 2018, the TSF Distribution totaled $653,058.09. See Repayment Schedule (Exhibit B to Agreement, which is Exhibit A to Thrivest's Demand).

7. Venue is proper here because Thrivest and White agreed to arbitrate their disputes within the Commonwealth of Pennsylvania and Thrivest has requested Pittsburgh as the venue.[2]

FACTUAL BACKGROUND[3]

White Approaches Thrivest Seeking An Advance On His $3.5 Million Expectancy; Thrivest Advances $500,000 To Satisfy White's IRS Obligations And Provide Financial Stability.

8. An 11-year veteran of the NFL, White was diagnosed with amyotrophic lateral sclerosis (ALS) in October 2016; at the time, White owed the IRS nearly $200,000 because of unpaid income taxes from 2008, 2011 and 2012—with interest and penalties accruing daily.

9. White needed immediate financial assistance. He expected $3.5 million from the NFL Concussion Settlement, but knew he would have to wait; he could not even submit his claim until March 2017 and everyone expected delay. So, like many other putative members of the class on whose behalf Class Counsel negotiated the NFL Concussion Settlement, White sought an advance against his expected recovery to help bridge his financial gap.

10. There were numerous lenders and funding companies providing advances at the time, and White chose Thrivest. Thrivest offered the lowest rate (19% per annum) for any non-recourse transaction—meaning that White would have no obligation to repay the advance if his claim was denied and that his other assets need not be tapped in the event of a shortfall in his award.

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[2] Thrivest requested Philadelphia as the venue for the arbitration in its Demand. AAA has not yet designated a venue for the Arbitration. The Agreement selects the Commonwealth of Pennsylvania, but does not designate a specific city. White and Attorney Wood are located near Columbus, Ohio. So as to choose a venue located between the two parties, Thrivest has asked AAA to designate Pittsburgh as the venue, withdrawing its earlier request for Philadelphia.

[3] A more thorough recitation of the factual background appears in Thrivest's Demand. For the purpose of this proceeding, Thrivest focuses on the facts pertaining to the question of arbitrability.

11. Thrivest projected that White would receive $3.5 million based on his ALS diagnosis and 11 years of service in the NFL; White requested an advance that would net him $450,000 after satisfying his obligations to the IRS and transaction fees,[4] but his attorney—Robert Wood, Esquire ("Attorney Wood")—later asked Thrivest to cap its advance at $500,000 total.

12. To confirm White's diagnosis and capacity to make independent legal and financial decisions, Thrivest sought the opinion of White's treating neurologist at Ohio State, Kevin Weber, M.D. ("Doctor Weber").

13. Doctor Weber confirmed White's ALS diagnosis and his professional opinion that White's disease "has in no way impaired [White's] ability to make his own legal, medical, and financial decisions"; moreover, based on a review of White's medical records, Doctor Weber indicated that White has never "lacked capacity to make independent legal, medical and financial decisions." See Physician's Statement of Mental Competency (Exhibit B to Demand).

14. Indeed, just last week, on April 25, 2018, White—appearing fit and healthy—delivered an eloquent invocation at the memorial service for former Ohio State University football coach Earle Bruce. See Video of White Invocation (beginning at 10:08) available at https://www.youtube.com/watch?v=RmbbOf-ct5I.

15. Based on Doctor Weber's assurances, Thrivest agreed to provide White a $500,000 advance on terms clearly summarized on the first page of the Agreement:

[4] The transaction fees included lien and judgment searches. White did not disclose his IRS obligations to Thrivest, but Thrivest discovered them through its due diligence.

DISCLOSURE STATEMENT

Distribution:	
The financial portion of the Settlement that the Seller is personallyentitled to:	$3,500,000.00
TSF Distribution:	
The portion of the Distribution that is being sold by the Seller and purchased by Buyer:	$ 880,194.29
The TSF Purchase Price amount:	
The dollar amount being paid to the Seller by Buyer as consideration for the sale of the TSF Distribution (as set forth in Exhibit B hereof):	$ 500,000.00
Payoff of prior liens and judgments:	$ 192,253.89
Net payment to Seller:	$ 282,746.11
Transaction Fees (which shall not be deemed to be interest (if this agreement is characterized as a loan) to be paid by Seller:	
Origination Fee	$ 2,455.00
Application Fee	$ 200.00
Underwriting Fee	$ 4,910.00
Due Diligence Fee	$ 7,365.00
Lien/Judgment Search Fee	$ 4,910.00
Broker Fee	WAIVED
Legal Fee	$ 4,910.00
Closing Fee	$ 250.00
Total Transaction Fees:	$ 25,000.00

See Agreement (Exhibit A to Demand).

16. White signed the Agreement on December 19, 2016, and his wife Nikol signed a "Spousal Acknowledgment and Consent" that same day, acknowledging the transaction with Thrivest. See Spousal Acknowledgment and Consent (Exhibit C to Demand).

17. Attorney Wood notarized White's signature on the Agreement, attesting that White "acknowledged that he executed the same for the purposes therein contained." See Agreement at 4 (Exhibit A).

18. In connection with the Agreement, White signed a "Limited Irrevocable Power of Attorney," which transferred authority to deposit checks payable to White from the NFL Concussion Settlement to Thrivest; Attorney Wood notarized White's signature on that document as well. See Limited Irrevocable Power of Attorney (Exhibit D to Demand) ("I understand that by executing this Power of Attorney, I am giving up the right to endorse and deposit the Payments,

except as otherwise authorized by Buyer. This Power of Attorney may not be revoked or changed except upon the prior written consent of TSF.").

19. White also executed a "Certification," wherein he certified (under penalty of perjury) the accuracy of all of his statements in the Agreement—including his representation to Thrivest in Section 3(c) that he "has the unrestricted right to assign the TSF Distribution;" once again, Attorney Wood notarized his signature. See Certification of William White (Exhibit E to Demand).

20. And, to make clear to Attorney Wood his intent to comply with the Agreement, White executed an "Irrevocable Authorization and Directive," among other things, directing Attorney Wood to update Thrivest about the status of his claim and to remit payment directly to Thrivest within days of receiving the settlement award; Attorney Wood notarized White's signature on that document and, in addition, executed his own "Attorney Acknowledgment and Notice of Assignment" acknowledging his awareness of the Agreement. See Irrevocable Authorization and Directive (Exhibit F to Demand); Attorney Acknowledgment and Notice of Assignment (Exhibit G to Demand).

21. Thrivest advanced $500,000 of White's expected $3.5 million recovery; White used $192,253.89 to satisfy his IRS liens[5] and received $282,746.11 (the remainder less transaction fees) to use as he saw fit.

More Than A Year Later, White Claims
That The Agreement Is Invalid And Reneges On His Promises.

22. By all indications, White was a satisfied customer. He never complained, and Attorney Wood provided regular updates on the status of his claim to Thrivest.

[5] The IRS agreed to accept $192,253.89 to satisfy White's total liability of $195,591.97.

23. But, in March 2018, after the Claims Administrator approved White's award, White told Thrivest that he would not honor his promise to transfer the TSF Distribution to Thrivest; instead, White gave Thrivest an ultimatum—either waive its rights under the Agreement by April 12, 2018 and recover only principal, or receive no repayment whatsoever.

24. White purported to justify this abrupt change by referencing an opinion from the Court in the NFL Concussion Litigation interpreting the No Assignment of Claims Provision and the "Rules Governing Assignment of Claims" adopted by the Claims Administrator thereafter. See December 8, 2017 Explanation and Order (the "Explanation and Order") (Exhibit H to Demand); and Rules Governing Assignment of Claims (the "Assignment Rules") (Exhibit J to Demand).

25. The No Assignment of Claims Provision prohibited Class Members from assigning "any rights or claims relating to the subject matter of the Class Action Complaint":

> No Assignment of Claims. Neither the Settlement Class nor any Class or Subclass Representative or Settlement Class Member has assigned, will assign, or will attempt to assign, to any person or entity other than the NFL Parties ***any rights or claims relating to the subject matter of the Class Action Complaint***. Any such assignment, or attempt to assign, to any person or entity other than the NFL Parties any rights or claims relating to the subject matter of the Class Action Complaint will be void, invalid, and of no force and effect and the Claims Administrator shall not recognize any such action.

See Settlement Agreement at 30.1 (emphasis added).

26. In response to a certified question from another judge in an action against another funding company, the Court in the NFL Concussion Litigation said that the purpose of the No Assignment of Claims Provision was "to protect the interests of Class Members by recognizing that Class Members receiving monetary awards are by definition ***cognitively impaired***." See Explanation and Order at 1 (Exhibit H) (emphasis added).

27. Accordingly, without specific reference to any particular class member or transaction, the Court opined that "Class Members are prohibited from assigning or attempting to assign any ***monetary claims***, and any such purported assignment is void, invalid and of no force and effect."[6] See id. at 4 (Exhibit H) (emphasis added).

28. Thrivest was not a party to the NFL Concussion Litigation or the Settlement Agreement resolving that dispute, and neither Thrivest nor White are referenced in the Explanation and Order, which is presently pending on appeal.[7] See generally In re: National Football League Players' Concussion Injury Litigation, case docketed at No. 18-1040 (3d Cir.).

29. The Explanation and Order, the Assignment Rules and White's assertion (through Attorney Wood, the same attorney who notarized the Agreement) that "there is no agreement" created a dispute concerning the validity of the Agreement and so Thrivest commenced the Arbitration.

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[6] Among other things, the Arbitrator will be asked to decide whether the Agreement is not an assignment, but rather a "true sale" through which White transferred the risk of loss to Thrivest in exchange for the market value of his claim, but did not assign his rights or claims against the NFL so as to afford Thrivest privity. See e.g., LaSalle Nat'l Bank Ass'n v. Paloian, 406 B.R. 299, 315 n.11 (N.D. Ill. 2009) (citing Thomas E. Plank, *The Security of Securitization and the Future of Security*, 25 Cardozo L. Rev. 1655, 1675 (2004)).

[7] Contrary to White's assertion that the Settlement Agreement vests the Court in the NFL Concussion Litigation with jurisdiction over Thrivest's Agreement, Section 27.1 of the Settlement Agreement logically limits the Court's continuing jurisdiction to "the Parties and their counsel, all Settlement Class Members, the Special Master, BAP Administrator, Claims Administrator, Liens Resolution Administrator, Appeals Advisory Panel, Appeals Advisory Panel Consultants and Trustee with respect to the terms of the Settlement Agreement." Thus, neither the Settlement Agreement, nor the Court's order approving it, gave the Court jurisdiction over Thrivest—which was neither a party to the NFL Concussion Litigation nor a party to the Settlement Agreement. Indeed, Thrivest's Agreement with White does not require White to transfer the TSF Distribution until after his participation in the settlement has concluded—i.e., when he receives his distribution from the Claims Administrator. Once the Claims Administrator distributes White's award, the Court's jurisdiction over the award ends and White is free to spend the money—of course, subject to his other obligations such as under a mortgage or pursuant to his Agreement with Thrivest.

The Arbitrator, Not The Court, Must Decide
Whether The Agreement Is Valid And Whether White Breached His Promises.

30. The Agreement between Thrivest and White contains a clause designating AAA arbitration as the exclusive method of dispute resolution (the "Arbitration Agreement") as follows:

> Dispute Resolution. Notwithstanding anything to the contrary herein, Buyer and Seller unconditionally agree that any dispute, controversy or claim arising out of, or relating in any way to this purchase and sale Agreement, including without limitation, any dispute concerning the construction, ***validity***, interpretation, ***enforceability***, ***alleged breach by either party***, and/or any other term set forth in the Agreement ***shall be exclusively resolved by binding arbitration*** upon Buyer or Seller submitting the dispute to the American Arbitration Association within 30 days of written notice to the other party.

See Agreement at Section 6(z) (Exhibit A) (emphasis added).

31. Thrivest and White selected Pennsylvania law as governing the arbitration and agreed that the arbitration "shall be conducted within the jurisdiction of the Commonwealth of Pennsylvania." Id.

32. The Arbitration Agreement provides that either party "may apply (in the event of an emergent issue) to a Pennsylvania state or federal court for interim or emergent relief, including without limitation a proceeding to compel arbitration." Id.

33. The Arbitration Agreement obligates the "unsuccessful party" to bear the cost of the arbitration proceeding and Section 5(d) of the Agreement requires White to pay "all costs and expenses incurred by [Thrivest] (including reasonable attorney's fees) paid to enforce the terms of the Agreement" in the event of a breach by White. See id. at Section 5(d) and 6(z).

34. Moreover, the Agreement contains a conspicuous class action waiver (the "Class Action Waiver"):

> SELLER HEREBY WAIVES THE RIGHT TO CONSOLIDATE UNDER ANY MULTI DISTRICT LITIGATION OR OTHER CONSOLIDATION, OR BECOME PART OF A CLASS ACTION, OR ANY OTHER PROCEEDING, CONTROVERSY, ARBITRATION AND/OR DISPUTE OF ANY NATURE INVOLVING ANY PERSON OR ENTITY WHO IS NOT A PARTY TO THIS AGREEMENT.

See Agreement at Section 6(bb) (Exhibit A) (emphasis added).

35. Merits of the Court's interpretation of the No Assignment of Claims Provision aside, the case law is clear that only an arbitrator has jurisdiction over Thrivest's Agreement with White under both the Arbitration Agreement and the Class Action Waiver. See Rent-A-Center, 561 U.S. at 72 (noting "a party's challenge to [a provision other than the arbitration clause], or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate"); and AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (upholding class action waiver and invalidating a law conditioning enforcement of arbitration on the availability of class procedure because that law "interfere[d] with the fundamental attributes of arbitration").[8]

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[8] In the Arbitration, White has relied on Nieto v. 2249 Corp., 2018 WL 1737220, *3, 5 (S.D.N.Y., Mar. 22, 2018), and Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010), to contest arbitrability. His reliance is misplaced. The issue here is the validity of the Agreement, not its formation.

Nieto involved employees who did not speak English and who contested their signatures on the relevant employment agreements. See Nieto, 2018 WL 1737220 at *3, 5 ("the making of an arbitration agreement is a non-arbitrable issue"). Thus, there was "an issue of fact as to the ***making of the agreement for arbitration***" itself, which required a trial. See id. at *4, n.3 (emphasis added) (distinguishing "formation issue" raised by plaintiffs in Nieto from challenge to validity of agreement on the whole discussed in Rent-A-Center).

Likewise, Granite Rock Co. involved formation—not validity—of an agreement. 561 U.S. at 287 (2010). In Granite Rock, there was a labor strike after a collective bargaining agreement had expired. Id. at 293-94. Eventually, the parties agreed to end the strike and return to work under a new collective bargaining agreement that contained not only an arbitration clause and a "no strike" clause, but also an effective date as of the end of the old agreement. Id. at 305-306. There, the parties disagreed over whether there was a collective bargaining agreement—and thus an agreement to arbitrate—in place during the interim period (between the new and the old agreements) such that a claim for damages for breach of the "no strike" clause could "arise under"

36. There can be no dispute that White's challenge to the validity of the Agreement and Thrivest's claim for breach fall squarely within the Arbitration Agreement and thus the Court must compel White to arbitrate that dispute.

COUNT I: CLAIM TO COMPEL ARBITRATION

37. Thrivest incorporates by reference its previous allegations.

38. The Federal Arbitration Act ("FAA") "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983).

39. The United States Supreme Court mandates that both state and federal courts must enforce the FAA with respect to all arbitration agreements covered by that statute, and must enforce the bargain of the parties to arbitrate. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (internal citation omitted).

40. Section 2 of the FAA requires judicial enforcement of Arbitration Agreements "save upon such grounds as exist at law or in equity for the revocation of any contract" as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, ***shall be valid,***

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an existing agreement. Ibid. In short, the Supreme Court said that the ratification dispute must be decided by the Court and not the arbitrator because it turned on whether an agreement had been formed at the time of the strike. See id. at 305 ("If, as Local asserts, the CBA containing the parties' arbitration clause was not ratified, and thus not formed, until August 22, there was no CBA for the July no-strike dispute to "arise under," and thus no valid basis for the Court of Appeals' conclusion that Granite Rock's July 9 claims arose under the CBA and were thus arbitrable along with, by extension, Local's formation date defense to those claims.").

> ***irrevocable, and enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added).[9]

41. There is no dispute that Thrivest and White agreed to arbitrate the issues in the Arbitration or that White waived any right to resolve disputes under the Agreement in the NFL Concussion Litigation; yet, White refuses to submit to AAA's jurisdiction and contends that the Court's Explanation and Order voided his obligations to Thrivest under the Agreement.

42. The Arbitration Agreement is enforceable by this Court under the FAA, which specifically authorizes this Court, upon petition, to enter an order directing that arbitration proceed in the manner provided for in the parties' Arbitration Agreement. See 9 U.S.C. § 4.

WHEREFORE, Thrivest respectfully requests that the Court enter an order in the form filed herewith directing White to arbitrate the parties' dispute in the Arbitration, awarding Thrivest its costs and fees incurred in bringing this action, and awarding any further relief that the Court deems appropriate.

Respectfully submitted,

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AND

[9] The Agreement is evidence of a transaction involving commerce under 9 U.S.C. § 2.

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